

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE WALLA WALLA COUNTRY CLUB, a)
Washington corporation,) NO. CV-13-5101-LRS
)
Plaintiff,) ORDER RE DEFENDANT'S MOTION TO
DISMISS
)
-vs-)
)
PACIFICORP, dba PACIFIC POWER &)
LIGHT COMPANY, an Oregon)
corporation,)
)
Defendant.)
)

BEFORE THE COURT is Defendant's Motion to Dismiss For Lack of Subject Matter (ECF No. 11), filed on December 12, 2013 and noted for oral argument on March 13, 2014. Due to court calendar conflicts, a hearing was held on June 5, 2014 in Yakima, Washington. Matthew W. Daley, David S. Grossman, and Stanley M. Schwartz appeared on behalf of Plaintiff Walla Walla Country Club. Troy D. Greenfield appeared on behalf of Defendant PacifiCorp, dba Pacific Power & Light Company (hereinafter "PacifiCorp"). At the close of oral argument, the court took the matter under advisement.

11

1 **I. INTRODUCTION**

2 Defendant PacifiCorp moves to dismiss for lack of subject matter
3 jurisdiction under Fed.R.Civ.P. 12(b) (1), arguing that the dispute in
4 this case must be resolved by the Washington Utilities and Transportation
5 Commission (hereinafter "WUTC"). Defendant argues the WUTC has exclusive
6 jurisdiction to determine whether the cost quoted by PacifiCorp, for
7 removal of utility facilities supplying power to Plaintiff Walla Walla
8 Country Club (hereinafter "Country Club") exceeds what is permitted by
9 PacifiCorp's tariff. Defendant maintains the Country Club's complaints
10 fall within the exclusive jurisdiction of the WUTC; therefore, state and
11 federal courts lack subject matter jurisdiction. PacifiCorp moves for
12 an order dismissing this action for lack of subject matter jurisdiction
13 under Fed.R.Civ.P. Rule 12(b) (1).

14 In the alternative, PacifiCorp argues the court should dismiss and
15 refer the action to the WUTC under the doctrine of primary jurisdiction.
16 PacifiCorp asserts that the dispute is within the WUTC's area of special
17 expertise, authority, and pervasive regulation. Additionally, PacifiCorp
18 notes the instant issues are before the WUTC at this time and a judicial
19 decision risks conflicting with the WUTC's determination.

20 **II. BACKGROUND**

21 In October 2012, the Country Club asked PacifiCorp to disconnect the
22 County Club's facilities from PacifiCorp's electrical grid, so that the
23 Country Club could transfer its utility service to Columbia Rural
24 Electric Association, Inc. (hereinafter "CREA"), one of Pacific Power's
25

1 competitors.¹ PacifiCorp informed the Country Club that its tariff,
 2 which has been approved by the WUTC, requires the Country Club to pay the
 3 cost to remove certain utility equipment that PacifiCorp had installed
 4 specifically to provide service to the Country Club.

5 The PacifiCorp's Rule 6, General Rules and Regulations (hereinafter
 6 "tariff"), Section I provides, in pertinent part:

7 **I. PERMANENT DISCONNECTION AND REMOVAL OF COMPANY FACILITIES:**

8 When Customer requests Permanent Disconnection of
 9 Company's facilities, Customer shall pay to Company
 10 the actual cost for removal less salvage of those
 11 facilities that need to be removed for safety or
 operational reasons . . .

12 . . .
 13 Company shall provide an estimate of such charges to
 14 Customer prior to removal of facilities. The
 15 Customer shall pay the amount estimated prior to
 16 disconnection and removal of facilities. The
 17 facilities shall be removed at a date and time
 18 convenient to both the Customer and the Company. No
 19 later than 60 days after removal, Company shall
 20 determine the actual cost for removal less salvage,
 and adjust the estimated bill to that amount . . .

ECF No. 13, Exh. A.

Schedule 300 of PacifiCorp's tariff also provides that the rate charged for removal of facilities for "nonresidential service removals" is the "actual cost less salvage." *Id.*

In July 2012, PacifiCorp verbally gave the Country Club an initial estimate of the cost to remove a portion of the PacifiCorp facilities required for disconnection. ECF No. 14 at ¶ 4. PacifiCorp's removal quotes last for ninety days. *Id.* Once the parties agree,

¹CREA is not regulated by the WUTC.

1 PacifiCorp and the customer execute a contract for the removal. *Id.* Upon
2 receiving the estimate, the Country Club elected against discontinuing
3 any portion of services with PacifiCorp. *Id.* at ¶ 5. No removal contract
4 was signed. CREA again pursued the Country Club's business and offered
5 to pay the cost of facilities removal. *Id.* In October 2012, after the
6 initial estimate had expired and the Country Club had some further
7 discussions with CREA, the Country Club notified PacifiCorp that it
8 intended to permanently discontinue its service² with PacifiCorp and move
9 all of its business to CREA. *Id.* at ¶ 5.

10 In response to this information, PacifiCorp began to update the
11 initial estimate provided in July, to include removal of all facilities,
12 which, by way of example, would include among other things, digging up
13 the golf course fairways, greens and parking lot. The estimated removal
14 costs ended up being significantly higher than originally estimated. On
15 December 28, 2012, after PacifiCorp informed the Country Club of the
16 total estimated cost of removal, the Country Club filed an informal
17 complaint with the WUTC. The Country Club contended that removal of the
18 conduit was unnecessary and could damage its property. *Id.*

19 On January 11, 2013, PacifiCorp submitted a request for a general
20 rate revision to the WUTC. This filing included potential revisions to
21 Rule 6 and Schedule 300, which address removal of facilities when a
22 customer requests permanent disconnection. ECF No. 13 at ¶ 3. On January
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26 ²PacifiCorp had provided service to the Country Club for the past 90 years.

1 15, 2013, CREA intervened to challenge PacifiCorp's potential changes to
2 the tariff. Id. The WUTC found that "while CREA does not have a direct
3 and substantial interest in charges to PSE's [sic] customers, the
4 Commission has a strong interest in seeing that the record is fully
5 developed . . ." and thus allowed CREA to intervene. Id.; Exh. B. CREA
6 proposed a number of additional changes to the portion of the tariff
7 pertaining to facilities removal, likely in anticipation of other
8 PacifiCorp customers desiring disconnection or transfer of existing
9 services to another provider.

10 On January 25, 2013, PacifiCorp informed the Country Club and the
11 WUTC that the cost to remove the facilities would be \$104,176.³ *Id.* at ¶
12 8. The WUTC closed the informal complaint as "Company Upheld with
13 Arrangements." *Id.* PacifiCorp indicated that it would transfer services
14 after the Country Club had paid a disconnection fee of approximately
15 \$100,000. The Country Club refused to pay the demanded disconnection fee
16 for the removal or to otherwise purchase the facilities. The Country
17 Club did not file a formal complaint with the WUTC or seek further
18 assistance from the agency. PacifiCorp has refused to disconnect the
19 Country Club from the electrical grid.

20 On July 11, 2013, PacifiCorp elected to withdraw the portion of its
21 proposed tariff revision pertaining to Rule 6 and Schedule 300, so it

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24 ³The \$104,176.00 figure included two components: (i) \$66,718 for the
25 removal of two separate runs of conduit, along with the attendant
electrical vaults; and (ii) \$37,458 for the removal of wires,
26 transformers and metering equipment. See Complaint, ECF. No. 1, ¶3.14.

1 could "gather additional data and analysis regarding the actual costs"
2 of removal services. ECF No. 13 at ¶ 4; Exh. C. CREA objected to this
3 withdrawal, arguing that the WUTC should consider CREA's objections to
4 the portion of the proposed tariff revision addressing the cost of
5 facilities removal, despite PacifiCorp's withdrawal of its proposed
6 changes. *Id.* The WUTC granted PacifiCorp's motion to withdraw its
7 proposed tariff revisions and dismissed CREA as a party. *Id.* The WUTC
8 did, however, "require [PacifiCorp] to initiate another proceeding within
9 the next four months in which the Commission can carefully review
10 PacifiCorp's costs, terms, and conditions of service and the Company's
11 administration of Schedule 300 and Rule 6." *Id.*

13 On August 6, 2013, the Country Club initiated this action in Walla
14 Walla Superior Court (i) to require PacifiCorp to disconnect its service
15 under a breach of contract (Tariff Containing Rate Schedules and General
16 Rules); and (ii) to recover damages for the consequential losses that the
17 County Club suffered as a result of PacifiCorp's refusal to disconnect
18 its service. On September 6, 2013, PacifiCorp removed this case to
19 federal court based on diversity. ECF No. 1.

20 III. DISCUSSION

21 A. 12(b) (1) Standard

23 Whether the court possesses jurisdiction to decide the merits of a
24 case is a threshold matter. *Steel Co. v. Citizens for a Better Env't*, 523
25 U.S. 83, 94-95, 118 S. Ct. 1003 (1998). Subject matter jurisdiction is
26 mandatory and unwaivable. It must be established before a plaintiff's

1 claims can be considered on the merits. *Wilbur v. Locke*, 423 F.3d 1101,
2 1105 (9th Cir. 2005). “[W]hen a federal court concludes that it lacks
3 subject-matter jurisdiction, the court must dismiss the complaint in its
4 entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235
5 (2006).

6 **B. WUTC - Exclusive Jurisdiction**

7 PacificCorp argues that the Country Club's complaint—whether a fee
8 charged by a public service company exceeds the tariff rate or is
9 unreasonable--falls squarely within the exclusive jurisdiction of the
10 WUTC. Therefore, state and federal courts lack subject matter
11 jurisdiction. PacificCorp further argues that RCW 80.04.220-.240 applies
12 in this case, not RCW 80.04.440 as the Country Club asserts.

13 The Country Club disagrees urging that RCW 80.04.440 specifically
14 affords a private right of action, in court, to recover damages caused
15 by a public utility's violation of duty. That statute states that “[a]n
16 action to recover for such loss, damage or injury may be brought in any
17 court of competent jurisdiction by any person or corporation.” The
18 Country Club's predominant complaint is that it allegedly can not obtain
19 its requested relief before the WUTC because the WUTC is not authorized
20 to resolve the damage claims. By inference however, the only “damages”
21 alleged or discussed at oral argument (loss of electrical rate cost
22 savings while awaiting an adjudication by WUTC and/or facility
23 restoration/equipment removal expense) would appear to fall within the
24 agency's authority.
25

1 The Country Club insists this case is a straight-forward breach of
2 contract case, and contends that the only issue is whether some safety
3 or operational reasons require PacifiCorp to remove the facilities.

4 The court is not convinced that this is a simple breach of contract
5 claim. The Country Club, in its original state court complaint, alleges
6 that this dispute is over the charge to disconnect facilities needed to
7 switch its electrical utility provider. The Country Club complains that
8 the charge for more than \$100,000 to remove the required facilities is
9 what this dispute is all about. The complaint alleges, "PacifiCorp
10 breached its contractual obligations, under the Rules, by refusing to
11 disconnect the Club's property from PacifiCorp's facilities unless and
12 until the Club paid to remove or purchased the conduit and vaults." ECF
13 No. 1 at ¶4.5. The complaint also alleges that PacifiCorp's charges for
14 facilities removal are excessive or not allowed by the tariff. *Id.* at
15 ¶ 3.19. The complaint alleges PacifiCorp breached its contractual
16 obligations under the tariff. *Id.* at ¶ 4.6.

17 In reality, the Country Club is complaining that PacifiCorp is
18 charging an excessive or exorbitant amount (\$104,176) for such
19 disconnection services, which is impeding their ability to switch utility
20 companies because they refuse to pay this excessive amount. It appears
21 that the RCW 80.04.220 is the statute on point for this complaint, which
22 reads:

23 **80.04.220. Reparations**

24 When complaint has been made to the commission
25 concerning the reasonableness of any rate, toll,

1 rental or charge for any service performed by any
2 public service company, and the same has been
3 investigated by the commission, and the commission
4 has determined that the public service company has
5 charged an excessive or exorbitant amount for such
6 service, and the commission has determined that any
7 party complainant is entitled to an award of
8 damages, the commission shall order that the public
service company pay to the complainant the excess
amount found to have been charged, whether such
excess amount was charged and collected before or
after the filing of said complaint, with interest
from the date of the collection of said excess
amount.

RCW 80.04.220

This judicial officer concludes that in light of the foregoing language, the Country Club's complaint is covered by RCW 80.04.220, which provides a process for a formal complaint concerning the reasonableness of any charge for any service performed. Further, once a complaint is made to the commission that PacifiCorp has overcharged for a service, i.e., disconnection of facilities, RCW 80.04.230 provides for a refund for said overcharges when warranted following an investigation and decision. This statute reads:

80.04.230. Overcharges--Refund

When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.

RCW 80.04.230

1 The County Club concedes that Rule 6 is the specific tariff provision
2 that applies in this. The parties do not dispute that Rule 6 would guide
3 the commission in determining if the public service company has charged
4 in excess of the lawful amount. Finally, if an overcharge is determined
5 and the public service company fails to repay such overcharge ordered by
6 WUTC, RCW 80.04.240 creates a new right or independent cause of action
7 to collect and claim by plenary action in a tribunal of competent
8 jurisdiction. This statute provides:

9

10 **80.04.240. Action in court on reparations and overcharges**

11 If the public service company does not comply with
12 the order of the commission for the payment of the
13 overcharge within the time limited in such order,
14 suit may be instituted in any superior court where
15 service may be had upon the said company to recover
16 the amount of the overcharge with interest. It shall
17 be the duty of the commission to certify its record
18 in the case, including all exhibits, to the court.
19 Such record shall be filed with the clerk of said
20 court within thirty days after such suit shall have
21 been started and said suit shall be heard on the
22 evidence and exhibits introduced before the
23 commission and certified to by it. If the
24 complainant shall prevail in such action, the
25 superior court shall enter judgment for the amount
26 of the overcharge with interest and shall allow
complainant a reasonable attorney's fee, and the
cost of preparing and certifying said record for the
benefit of and to be paid to the commission by
complainant, and deposited by the commission in the
public service revolving fund, said sums to be fixed
and collected as a part of the costs of the suit. If
the order of the commission shall be found to be
contrary to law or erroneous by reason of the
rejection of testimony properly offered, the court
shall remand the cause to the commission with
instructions to receive the testimony so proffered
and rejected and enter a new order based upon the
evidence theretofore taken and such as it is
directed to receive. The court may in its discretion

1 remand any cause which is reversed by it to the
2 commission for further action. Appeals to the
3 supreme court shall lie as in other civil cases. All
4 complaints concerning overcharges resulting from
5 collecting unreasonable rates and charges or from
6 collecting amounts in excess of lawful rates shall
7 be filed with the commission within six months in
8 cases involving the collection of unreasonable rates
9 and two years in cases involving the collection of
10 more than lawful rates from the time the cause of
11 action accrues, and the suit to recover the
12 overcharge shall be filed in the superior court
13 within one year from the date of the order of the
14 commission.

15 The procedure provided in this section is exclusive,
16 and neither the supreme court nor any superior court
17 shall have jurisdiction save in the manner
18 hereinbefore provided.

19 RCW 80.04.240

20 This court concludes that although the Country Club's argument is couched
21 in terms of a "straight-forward" breach of an "individual" contract claim
22 with compensable damages, the Country Club's claim is really one for
23 overcharges, for which they have not sought to file a formal complaint
24 pursuant to the statutes in place for doing so.⁴ Considering the actions
25 of CREA in front of the WUTC, i.e., intervening to challenge PacifiCorp's
potential changes to the tariff at issue here, the Country Club appears
to be seeking a ruling that would be common to all PacifiCorp customers
who wish to disconnect and switch service to CREA. The court further
concludes that the commission appears to have ample statutory authority
to afford meaningful relief as described in the statutes recited above.

26 ⁴See *D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wash.App. 1
((1997)).

1 **C. Doctrine of Primary Jurisdiction - Referral to WUTC**

2 As an alternative, PacifiCorp argues that the court should exercise
3 its discretion and apply the doctrine of primary jurisdiction so as to
4 refer the Country Club's claims to WUTC for breach of contract and
5 damages due to excessive charges to disconnect.

6 PacifiCorp represents that the very same issues before this court
7 currently stand as an administrative proceeding in front of the WUTC.
8 The doctrine of primary jurisdiction "is concerned with promoting proper
9 relationships between the courts and administrative agencies charged with
10 particular regulatory duties." *Barahona v. T-Mobile US, Inc.*, 628
11 F.Supp.2d 1268, 1270 (W.D.Wash., 2009) citing *Nader v. Allegheny Airlines,*
12 *Inc.*, 426 U.S. 290, 303, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976). The
13 doctrine is properly invoked when enforcement of a claim in court would
14 require resolution of issues that have already been placed within the
15 special competence of an administrative body. The *T-Mobile US* court
16 quoted a passage wherein Justice Frankfurter described the following
17 circumstances the doctrine should be applied to:
18

19 [*I*n cases raising issues of fact not within the
20 conventional experience of judges or cases requiring
21 the exercise of administrative discretion, agencies
22 created by Congress for regulating the subject
23 matter should not be passed over.... Uniformity and
24 consistency in the regulation of business entrusted
25 to a particular agency are secured, and the limited
26 functions of review by the judiciary are more
rationally exercised, by preliminary resort for
ascertaining and interpreting the circumstances
underlying legal issues to agencies that are better
equipped than courts by specialization, by insight
gained through experience, and by more flexible
procedure.

1 *T-Mobile US, Inc.*, 628 F.Supp.2d at 1270 (citation omitted).

2 The doctrine is applied on a case-by-case basis, considering several
3 factors. First, the court should examine "whether the reasons for the
4 existence of the doctrine are present and whether the purposes it serves
5 will be aided by its application in the particular litigation." *Id.* At
6 1270-71 (citation omitted). Second, the court must determine if
7 uniformity is desirable and could be obtained through administrative,
8 rather than judicial, review. *Id.* (citation omitted). Finally, the
9 court considers the "expert and specialized knowledge of the agencies
10 involved...." *Id.* (citation omitted).

12 The Court finds, in applying these factors, that the doctrine of
13 primary jurisdiction is applicable in this case as another ground to
14 refer this matter to WUTC. As the court has concluded above, the dispute
15 is within the WUTC's area of special expertise, authority, and pervasive
16 regulation. For example, determining under the tariff those facilities
17 that need to be removed for safety or operational reasons and whether
18 certain facilities were necessary to provide service to a customer would
19 appear to be squarely within the expertise of the WUTC. Indeed, removal
20 of facilities when a customer requests permanent disconnection,
21 particularly the amounts charged, has been placed within the special
22 competence of the WUTC by RCW 80.04.220-.240.

24 In view of the disparity between the cases cited by the parties, the
25 Court finds that the interest of uniformity weighs heavily in favor of
26 deferring to the expertise of the WUTC under the primary jurisdiction

1 doctrine. The WUTC's determination as to whether PacifiCorp's
2 disconnection charge is a "charge" and if it is, whether the charge is
3 reasonable, will necessarily guide similar complaints or suits against
4 PacifiCorp when its customers seek to disconnect and establish service
5 with a public service competitor albeit one that is not regulated by
6 WUTC. Uniformity is very much at issue here, as the parties have pointed
7 out that other customers may be following suit and this issue is before
8 the WUTC currently. Thus, use of the primary jurisdiction doctrine and
9 referral to the WUTC will avoid disparate or conflicting outcomes for
10 customers and utility providers, and promote uniformity and consistency
11 in WUTC's regulation of the utility industry as the competition unfolds.
12 Accordingly, it is hereby **ORDERED** that Defendant's Motion to Dismiss, **ECF**
13 **No. 11**, is **GRANTED**. This case is dismissed for lack of subject matter
14 jurisdiction.

15 The District Court Executive is directed to enter this Order and
16 **CLOSE THE FILE**.

17 **DATED** this 24th day of June, 2014.

18 *s/Lonny R. Sukko*

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22 LONNY R. SUKKO
23 SENIOR UNITED STATES DISTRICT JUDGE
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